

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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DEPARTMENT OF HEALTH AND .
HUMAN SERVICES, SOCIAL .
SECURITY ADMINISTRATION AND .
SOCIAL SECURITY ADMINISTRATION. .
FIELD OPERATIONS, NEW YORK .
REGION .

Respondent .

and .

Case No. 2-CA-80006

AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
AFL-CIO .

Charging Party .

.
Cecile O'Connor, Esquire
For the General Counsel

John J. Barrett, Esquire
Melvin Steuerman
For the Respondent

Andrew Poulos
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on October 13, 1987, by the American Federation of Government Employees, AFL-CIO, (hereinafter called the Union or AFGE), a Complaint and Notice of Hearing was issued on January 29, 1988 by the Regional Director for Region II, Federal Labor Relations

Authority, New York, New York. The Complaint alleges that the Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region, (hereinafter call the Respondent or SSA), violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of the actions of a supervisor in issuing a written reprimand to Union Steward Geraldine Robinson for alleged disobedient and insubordinate conduct.

A hearing was held in the captioned matter on May 18, 1988 in New York, New York. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent filed post-hearing briefs on July 18, 1988, which have been duly considered.1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings of Fact

AFGE is the certified exclusive representative of a nationwide unit of Respondent's employees, which includes among others, a number of employees working in the Cypress Hills New York District Office of Respondent. Local 3369 is the AFGE's designated representative at the Cypress Hills New York District Office.

Ms. Geraldine Robinson, the alleged discriminatee herein, has been employed in the Cypress Hills District Office since 1978 when she was promoted to her present position, a Title 16 Claims Representative.2/ Prior to such

1/ In the absence of any objection, the General Counsel's "Motion to Correct Transcript," should be, and hereby is, granted.

2/ A Title 16 Claims Representative completes applications and prepares various documents for claimants seeking Supplemental Income Benefits. It is common for employees and supervisors to engage in discussions over the various claims and also to have varying interpretations as to the validity of such claims.

time she worked in another SSA office located in the East New York area. The record reveals that Ms. Robinson received four appraisals from various supervisors during the period 1983-1987, all of which rated her fully satisfactory and noted, among other things, that she got along well with her fellow employees. The latter two appraisals were made by Supervisor Dee Hendrie who began supervising Ms. Robinson some time in 1985. According to Ms. Robinson, whose testimony in this respect is uncontested, during her career with Respondent there has never been any notation in her file indicating her inability to get along with either her co-workers or supervisors.

Mr. Horace S. Johnson became the District Manager of the Cypress Hills Office in January or February 1987. He had formerly held the position of Assistant District Manager. Mr. David Gold became the Assistant Manager in September of 1987. Mr. Robert Bergelis is the Supervisor of the Title 2 Disability Unit at Cypress Hills.

In May 1987, Ms. Robinson became shop steward for Local 3369 which, as noted above, is the designated AFGE representative at the Cypress Hills District Office. Thereafter, she requested and received official time to perform various union activities from Supervisors Hendrie and Bergelis. The parties stipulated that the aforementioned supervisors and Mr. Gold were aware of Ms. Robinson's union activities. According to Ms. Robinson, although Respondent grants her requests for official time, it also grieves over the granting of such official time on the ground that it is improper.

During the period May 1987 - October 7, 1987, the date when the alleged insubordinate conduct leading up to the written reprimand underlying the instant complaint occurred, Ms. Robinson in her position as union steward represented a number of unit employees in connection with various grievances and EEO complaints and also conducted a union poll on non-duty time to obtain input from the employees on Respondent's non-smoking policy. While involved in the aforementioned activities, Ms. Robinson was accused by various management officials with going overboard on the use of official time, inaccurately filling out requests for official time, and making a reply to the poll mandatory. Also, in connection with her union representational activities, Ms. Robinson filed a grievance wherein she charged Ms. Hendrie, her immediate supervisor, with bypassing the Union and complained to Mr. Gold about Ms. Hendrie's interpretation of the procedures to be utilized for the use of official time as well as the manner in which Ms. Hendrie

treated her while she was performing her representational activities. At such time Mr. Gold made it clear to Ms. Robinson that while he did not necessarily approve of Ms. Hendrie's actions, nine out of ten times he would back up his supervisor.

On October 7, 1987, Ms. Robinson completed her draft of a Plan to Achieve Self Support (PASS) for a social security recipient. In preparing the draft of the PASS Ms. Robinson relied on the Procedure Reference Manual (PRM). Inasmuch as a PASS extension was a unique and rare work assignment in the Cypress Hills Office, Ms. Hendrie instructed Ms. Robinson to let her see a draft of her work on the PASS before issuing same. In accordance with Ms. Hendrie's instructions, Ms. Robinson dropped off a draft of the PASS at Ms. Hendrie's desk for her review. Approximately twenty minutes later Ms. Hendrie returned the document with her corrections to Ms. Robinson and told her that they would discuss it later.^{3/} According to Ms. Robinson, Ms. Hendrie did not direct her to make any further corrections or to withhold the document from typing pending further corrections.

Subsequently, Ms. Robinson opened the file and noted the various corrections that Ms. Hendrie had made on the PASS and then gave the PASS to a clerical employee with instructions to retype it and incorporate Ms. Hendrie's corrections. Later in the day Ms. Hendrie returned to Ms. Robinson's desk and asked for the file. Ms. Robinson retrieved it from the typist and gave it to Ms. Hendrie who then sat down at her desk and proceeded to make a number of corrections while stating that she did not like the way Ms. Robinson had drafted the letter. When Ms. Robinson replied that she had followed the PRM, Ms. Hendrie stated that she did not care and that it should read the way she was rewriting it. According to Ms. Robinson, most of Ms. Hendrie's corrections were grammatical and the substance of the PASS was not changed. When Ms. Hendrie finished with her corrections, Ms. Robinson commented that Ms. Hendrie might as well have written the original PASS herself. Whereupon, Ms. Hendrie yelled "No, I told you to do it," slammed the file down on Ms. Robinson's desk and walked away. Thereafter, when

^{3/} The record indicates that at the time Ms. Hendrie returned the corrected PASS document to Ms. Robinson, she, Ms. Robinson, was interviewing a social security claimant or applicant.

Ms. Robinson turned to give the completed PASS to the typist she saw Mr. Gold come out of his office and walk over to Ms. Hendrie's desk. At that time Ms. Robinson heard Ms. Hendrie remark to Mr. Gold that "I'm sick and tired of her."

Ms. Robinson then walked over to Mr. Gold and informed him that she had done everything that Ms. Hendrie had instructed her to do. Mr. Gold asked if she had done what her supervisor had told her to do. When Ms. Robinson answered in the affirmative, Mr. Gold responded "Well, as far as I'm concerned, your supervisor told you to do something and you didn't do it." Ms. Robinson then walked back to her desk and Mr. Gold followed her. Mr. Gold told her that she could not continue to come to him everytime her supervisor told her to do something.^{4/} After a short conversation during which Ms. Robinson again denied that she had refused to follow instructions, Mr. Gold repeated that it was his opinion that she had refused to follow an order from Ms. Hendrie and walked away from Ms. Robinson's desk.^{5/}

On October 8, 1987 Ms. Hendrie gave Ms. Robinson a written reprimand which reads in pertinent part as follows:

. . . We then proceeded to discuss the changes made, along with other details pertaining to the file, making changes as necessary. At that point you said to me in a loud voice and in an arrogant tone, "If you don't like the way I did it, why don't you do it." I responded by instructing you to make the corrections yourself. "Because it is your job, not mine". You replied, "Well, I'm not doing it, you do it". After again directing you to make the corrections and again being told that I should do it, I left your desk.

^{4/} According to Ms. Robinson, Mr. Gold's remark was directed to the fact that she had complained to him the day before about how Ms. Hendrie was treating her official time requests.

^{5/} The foregoing summary of facts is based upon Ms. Robinson's testimony.

Despite the fact that I had ceased speaking with you, left your desk, and was walking away from you, you continued to speak to me in a loud, antagonistic manner. You were disruptive and confrontational and spoke loudly enough for half the office to hear you, including both employees and claimants. You proceeded to follow me to my desk, at which time you continued to be loud and disruptive and to exacerbate the situation. You insisted on getting the last word. Your behavior was noted by the Assistant District Manager, David S. Gold, who was at my desk. You continued your heated diatribe with him.

You have refused to accept corrections to your work from me. You have turned a simple, everyday work-related situation into a major confrontation. You have disrupted the worksite. You have been flagrantly disobedient and have acted in an insubordinate manner.

You[r] behavior during this incident was inappropriate and unacceptable. It had the effect of disrupting the working environment of the office and undermining my authority. I cannot allow such behavior to continue. For this reason, I have decided to reprimand you to promote the efficiency of the Federal service.

Ms. Robinson denies following Ms. Hendrie to her desk immediately after their confrontation in an attempt to continue the conversation. She further denies making noise and disrupting the office as alleged in the letter of reprimand. According to Ms. Robinson, any noise emanating from her desk was occasioned solely by Ms. Hendrie's action in slamming the file down on her desk and yelling "I told you to do it" in response to Ms. Robinson's alleged innocent remark.

In this latter connection, employees Kaufman, Boyce and Guestela, whose desks are located three to five feet away from Ms. Robinson's desk, all testified that they were not really disturbed by the altercation between Ms. Robinson

and Ms. Hendrie because Ms. Hendrie had a habit of yelling and talking loud. As far as any noise emanating from Ms. Robinson's desk, they all attribute same to Ms. Hendrie who they saw and heard slamming the file down, waving her arms and raising her voice. None of the employees, however, could recall the substance of the conversation between Ms. Robinson and Ms. Hendrie.^{6/}

Ms. Hendrie testified that sometime in the morning of October 7, 1987 she returned the PASS to Ms. Robinson, who at the time, was conducting an interview with a claimant. She told Ms. Robinson that she wanted to discuss the PASS with her when she finished her interview. According to Ms. Hendrie, she wanted to discuss some of the corrections she, Ms. Hendrie, had made on the PASS as well as the meaning of a paragraph on the PASS which had been written by Ms. Robinson.

Later in the morning Ms. Hendrie returned to Ms. Robinson's desk, requested the PASS and began a discussion thereon. During the discussion, in response to Ms. Hendrie's criticism of the PASS, Ms. Robinson stated, according to Ms. Hendrie, "if you don't like the way I'm doing it, do it yourself." According to Ms. Hendrie, Ms. Robinson's remark was "not too loud." When Ms. Hendrie then stated "it wasn't my job, it was her [Ms. Robinson] job to do it." Ms. Robinson in a louder voice stated "I'm not doing it, you do it." Ms. Hendrie then told Ms. Robinson "to do it and give it back to me" and proceeded to walk away towards her own desk. Upon reaching her desk, she looked up to see Ms. Robinson who, in a loud voice, stated "I'm not doing it over. If you don't like the way I did it, do it yourself." At that point Mr. Gold approached Ms. Hendrie's desk and told Ms. Robinson to do what her supervisor had asked her to do. Ms. Hendrie then walked away.

Mr. Gold testified that he transferred into the Cypress Hills District Office in September 1987 from Murray Hills where he was a Branch Manager.

According to Mr. Gold on the morning of October 7, 1987, he was about to leave his office and go over to Ms. Hendrie's desk to discuss a matter when he observed her walking towards Ms. Robinson's desk which was approximately 40 feet

^{6/} Ms. Boyce corroborates Ms. Robinson's testimony to the effect that she, Ms. Robinson, did not immediately follow Ms. Hendrie to her desk after the discussion.

away. He saw Ms. Hendrie sit down and engage in a conversation with Ms. Robinson. Shortly, thereafter, he heard Ms. Robinson state "I'm not going to do it, you do it." After a further conversation between the two, he again heard Ms. Robinson "saying something to the effect I'm not doing it, you do it." After Ms. Robinson again said in reply to some statement from Ms. Hendrie, "I'm not going to do it, you do it," Ms. Hendrie got up and started walking back to her desk which was located some 30 to 40 feet in the opposite direction. According to Mr. Gold, Ms. Robinson was following her.

At this point in time Mr. Gold started to walk towards Ms. Hendrie's desk to discuss something with her. As he approached her desk he heard Ms. Robinson again state that "she's not going to do it and if Dee didn't like the way she did it, she can do it." At about this point in time, according to Mr. Gold, Ms. Robinson saw him and stated "Dee came up to me with this case, it's not my job to do this, it's Dee's job to do it, I'm not doing to do it." Mr. Gold then proceeded to walk Ms. Robinson back to her desk while she continued speaking about the incident between herself and Ms. Hendrie. According to Mr. Gold, Ms. Robinson was loud and confrontational.

Subsequently, Ms. Hendrie spoke to Mr. Gold about the matter and it was decided that Ms. Robinson should be given a written reprimand for her insubordinate behavior.

Following the issuance of the reprimand, Ms. Robinson, on the advice of another Union official, filed an informal EEO complaint alleging discrimination on the basis of race and age. However, she never did file a formal EEO complaint.

While the record reveals that three other employees had been insubordinate and had not suffered any penalty as severe as a letter of reprimand, two of such employees were not under Ms. Hendrie's supervision and the third employee was counseled by Ms. Hendrie.

The record also reveals that Ms. Hendrie's father and husband were active union members at their respective places of employment and that Mr. Gold and his wife had formerly been members of the Union. In fact Mrs. Gold had been a union steward with Local 3369. Finally, the record discloses that Ms. Robinson received an oral warning for violating the smoking policy in July 1987.

Discussion and Conclusions

The General Counsel takes the position that Respondent reprimanded Ms. Robinson solely because of her union activities and argues in support of its position that "the testimony adduced in support of the reprimand was pretextual and not credible." Thus, the General Counsel points out that Respondent was aware of Ms. Robinson's union activity, which included, among other things, filing grievances against Ms. Hendrie for interfering with her representational activity, and the fact, based upon a credibility determination in Ms. Robinson's favor, that she was not insubordinate. In this latter context, the General Counsel points out that there was no reason for Ms. Robinson to be insubordinate since there was nothing left for her to do with the draft PASS after Ms. Hendrie had made her corrections but send it to a clerical for typing. In such circumstances, the General Counsel questions why Ms. Robinson would make the insubordinate statement attributed to her by Ms. Hendrie.

Alternatively, the General Counsel argues that the reprimand amounts to disparate treatment since other employees who were insubordinate were not given reprimands for their actions in this respect.

Respondent, on the other hand, takes the position that the reprimand was justified since Ms. Robinson was insubordinate and disrupted the office. Respondent denies that the reprimand amounts to disparate treatment since there is no showing that Ms. Hendrie had ever tolerated insubordination from other employees under her supervision. Additionally Respondent points out that the record is devoid of any showing of union animus on behalf of Mr. Gold and Ms. Hendrie.

It is clear from a reading of the respective positions of the General Counsel and the Respondent that basic to a resolution of the instant complaint is a factual finding with respect to what exactly was said by Ms. Robinson to Ms. Hendrie on October 7, 1987 in the response to her, Ms. Hendrie's, corrections to the PASS. In this connection, based upon my observation of the witnesses and their demeanor, I credit the mutually corroborative testimony of Ms. Hendrie and Mr. Gold to the effect that Ms. Robinson told Ms. Hendrie that she, Ms. Hendrie, "if you don't like the way I'm doing it, [the PASS] do it yourself" and thereafter in response to an order from Ms. Hendrie repeatedly stated "I'm not doing it, you do it."

In view of the above findings of fact, I conclude that Ms. Robinson was indeed insubordinate and that Respondent had a legitimate basis for the reprimand.

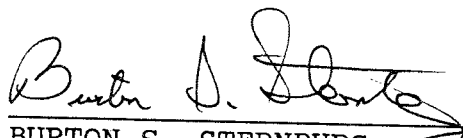
Turning now to the issue of disparate treatment, I find, contrary to the contention of the General Counsel, that the preponderance of the record evidence fails to establish that the Respondent's action in giving Ms. Robinson a reprimand for her insubordination to Ms. Hendrie amounts to disparate treatment. Thus, while the record establishes that three other employees might also have been guilty of insubordination and escaped reprimands for such conduct, two of them were insubordinate to other supervisors and the third was given an oral admonishment by Ms. Hendrie. Additionally, the circumstances surrounding the actions of the employee given the oral reprimand by Ms. Hendrie were clearly distinguishable from those surrounding the altercation between Ms. Robinson and Ms. Hendrie.

Having concluded that the record evidence supports the Respondent's position with respect to the alleged insubordination by Ms. Robinson and fails to establish that the ensuing reprimand accorded Ms. Robinson for such insubordination constituted disparate treatment within the meaning of Sections 7116(a)(1) and (2) of the Statute, it is hereby recommended that the Federal Labor Relations Authority adopt the following order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the complaint should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., November 9, 1988


BURTON S. STERNBURG
Administrative Law Judge